

ST 99-19

Tax Type: Sales Tax

Issue: Sales vs. Service Issues

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

“WINE & SPIRITS, INC.”,

Taxpayers

No. 97-ST-0000

Christine O’Donoghue
Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Francis Emmons, Esq., of Schwartz & Freeman, for the taxpayer; Mr. Mark Dyckman, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to a timely protest by taxpayer to the Notice of Tax Liability and the Notice of Tentative Denial of Claim issued for the period of December 1, 1993 through December 31, 1996 and September 1, 1994 through December 31, 1996, respectively. The issue identified by the parties in the pre-trial order is whether the taxpayer is liable for Retailers’ Occupation Tax (“ROT”) in excess of amounts paid to liquor stores on transactions involving delivery of liquor, wine or other alcoholic beverages to Illinois residents. After considering the evidence and the

memoranda of law filed by the parties in support of their respective positions, it is my recommendation that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission of the documents entitled "Correction in or Determination of Tax Due 12/93 to the Present" issued on May 28, 1997 showing \$9,047.00 in tax due and \$320.00 in penalties for the period of April 1, 1994 through December 31, 1996 and the "Notice of Tentative Denial of Claim" issued on March 8, 1999 denying a claim in the amount of \$9,047.00 for the period of September 1, 1994 through December 31, 1996. Dept. Group Ex. No. 1.
2. The Department issued a Notice of Tax Liability on September 10, 1997 for \$9,047.00 in tax and \$320.00 in penalties and interest. Initially, the taxpayer paid the tax and protested the penalty and interest. Taxpayer then filed a claim for credit on its payment of tax, which the Department thereafter denied. Dept. Group Ex. No. 1.
3. The Notice of Tax Liability and Notice of Tentative Denial of Claim were issued to:

"Wine & Spirits, Inc."
1111 N. Main Street, Suite 111
(City), IL 60000

Dept. Group Ex. No. 1.
4. "Wine & Spirits, Inc." does not have a common practice of informing the purchaser as to who will ship the gift. Tr. p. 27.

Conclusions of Law:

As a result of an audit, the Department issued an assessment for retailers' occupation tax to the taxpayer for the periods of December 1, 1993 through December 31, 1996. Taxpayer contends that it is not subject to the Retailers' Occupation Tax Act ("ROTA") because it is not a retailer since it does not transfer title or ownership to the liquor and accompanying gifts. Taxpayer maintains that it merely acts as an "intermediary for persons who want to send gifts of alcoholic beverages" and does nothing more than arrange for the delivery of these items. Taxpayer Brief. p. 3. Taxpayer also contends that the liquor stores are the entities subject to the ROT since 1) they are the only persons who can lawfully sell alcoholic beverages, 2) they provide all of the tangible personal property to the ultimate consumer and 3) they make the deliveries. Taxpayer Brief p. 4. In support of its position, the taxpayer relies on O'Brien v. Isaacs, 32 Ill. 2d 105 (1965).

At hearing, the Department introduced its corrections of tax returns for "Wine & Spirits, Inc." and its Denial of Claim into evidence under the certificate of the Director. Dept. Group Ex. No. 1. The Department's correction of the taxpayer's tax return and the Denial of Claim constitutes *prima facie* proof of the correctness of the amount of tax due. 35 ILCS 120/4; 35 ILCS 105/20. The Department's *prima facie* case is a rebuttable presumption, (Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157 (1968); DuPage Liquor Store, Inc. v. McKibben, 383 Ill. 276 (1943)), however, a taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's proposed

assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 826, 833 (1st Dist. 1988). Instead, a taxpayer must present evidence which is consistent, probable and identified with its books and records to show that the proposed assessment is not correct. Filichio v. Department of Revenue, 15 Ill. 2d 327, 333 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-834. Oral testimony without corroborating books and records is insufficient to overcome the Department's *prima facie* case. Mel Park Drugs v. Dept. of Revenue, 218 Ill. App. 3d 203(1st Dist. 1991).

In Elkay Manufacturing Co. v. Sweet, the first district court of appeals held that the Department's correction of a taxpayer's returns includes an implicit determination that the taxpayer is engaged in the business on which tax is assessed. Elkay Manufacturing Co., 202 Ill. App. 3d 466, 474 (1st Dist. 1990). Once the Department's correction of returns or determination of tax due is introduced as evidence at hearing, the burden then falls on the taxpayer to show that it was not engaged in the business upon which tax was based. Id. at 474-75. In Soho Club Inc. v. Department of Revenue, 269 Ill. App. 3d 220 (1st Dist. 1995), the court again held that the Department's correction of retailers' occupation returns filed during an audit period was, “. . . without more, . . . sufficient to establish a *prima facie* case that [the taxpayer] was engaged in a retail occupation during the period of the audit and thus subject to the ROT Act for that period . . .” Id. at 229-230.

27 CFR 194.19(B) federal regulation treatment as a broker.

At hearing, “Jane Doe”, the president of “Wine & Spirits, Inc.”, testified that the taxpayer does not act as a retailer and testified that the company does not have any liquor licenses from any agency, (Tr. p. 18), including the Illinois Liquor Commission. “Doe”

testified that the company is treated as a broker for federal purposes. Tr. p. 21. “Doe” testified that typically a purchaser calls “Wine & Spirits, Inc.” 800 number, identifies himself, gives the billing information, identifies the gift recipient and his address and indicates the message to be included with the gift. Tr. pp. 22, 23. “W & S” then processes this information and forwards it to a liquor store in the state in which the delivery is going to take place. Tr. p. 23. She testified that the company’s office is very small, and that there are no counters, cash registers, or clerks. Tr. p. 22. According to “Doe’s” testimony, the taxpayer never held an inventory of liquor in Illinois, nor did it provide gift baskets gift cards or any candy or fruit that would occasionally accompany the gifts of liquor. Tr. pp. 24, 25.

Although the taxpayer has put forth several arguments in its effort to prove that it should not be subject to the retailers’ occupation tax, at hearing, it only offered the testimony of “Jane Doe” to support its position. The taxpayer did not offer documentary evidence of any kind.

Clearly, by failing to offer documentation tied to its books and records the taxpayer has failed to rebut the *prima facie* correctness of the Department’s determination on the Notice of Tax Liability and the Notice of Tentative Denial of Claim. Documentary evidence establishing the legal relationship between the various parties and the nature of billing for each transaction are crucial for an analysis of taxpayer’s allegations and a determination of whether taxpayer’s arguments hold merit. Essential documents would include the following: sales invoices between both the customer and taxpayer and between the taxpayer and the liquor stores, shipping records. Perhaps most importantly, the taxpayer must present contracts into evidence establishing the legal

relationship between the taxpayer and the liquor store that delivered the liquor. Without even determining the relevance of the taxpayer's status as a retailer with other agencies and/or the federal government or whether it held a liquor license in Illinois, clearly Documents such as these are critical to proving its contention that it never held title to the tangible personal property transferred.

Without such documents I cannot determine the nature of the taxpayer's business operations, nor can I properly analyze the relative merit of the taxpayer's arguments under the statute or the holding in O'Brien v. Isaacs, *supra*. "Doe's" mere oral testimony as to the nature of the taxpayer's business and its billing practices is clearly insufficient to rebut the Department's *prima facie* case.

Lastly, the taxpayer asserts that it should not be subject to late filing and late payment penalties since it has established "reasonable cause."

"Reasonable cause" is determined in each case in accordance with regulations promulgated by the Department. 35 ILCS 735/3-8. The regulations provide that reasonable cause is determined on a case by case basis considering all pertinent facts and circumstances. 86 Ill. Admin. Code ch. I, sec. 700.400(b). The most important factor in determining whether reasonable cause exists is the extent to which the taxpayer made a good faith effort to determine the proper tax liability and to file and pay on time. *Id.* A taxpayer is considered to have made a good faith effort if it exercised "ordinary business care and prudence" in determining its liability to file and pay. 86 Ill. Admin. Code ch. I sec. 700.400(c). Whether the taxpayers exercised ordinary business care and prudence depends on the clarity of the law and the taxpayer's experience, knowledge and education. *Id.*

In the case at hand, there is no evidence of record which indicates that the taxpayer exercised the requisite ordinary business care and prudence to justify an abatement of penalty due to reasonable cause.

Wherefore, for the reasons stated above, it is my recommendation that the Notice of Tax Liability and the Notice of Tentative Denial of Claim be finalized.

Date: October 12, 1999

Administrative Law Judge